

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 16 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0372-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
CARLOS LEYVA SANTA MARIA,)	the Supreme Court
)	
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR51809 and CR52832

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

Law Offices of Matthew H. Green
By Matthew H. Green

Tucson
Attorney for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Carlos Santa Maria seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Santa Maria has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Santa Maria was convicted of attempted possession of marijuana for sale in August 1996 for an offense committed in December 1995. The trial court suspended the imposition of sentence and placed Santa Maria on probation for a period of five years. Santa Maria, who was a lawful permanent alien, subsequently was deported.

¶3 In July 2011, Santa Maria initiated a post-conviction proceeding, arguing in his petition that his Sixth-Amendment right had been violated because his counsel had not advised him of the immigration consequences of his guilty plea as required by *Padilla v. Kentucky*, ___ U.S. ___, 130 S.Ct. 1473 (2010). He maintained counsel had been ineffective in failing to advise him properly and asserted he could not “be faulted for failing to file [his] petition sooner, since he only became aware of the constitutional deficiency of his trial attorney’s performance” after consulting with his Rule 32 counsel in early 2011. And he further contended his guilty plea should be vacated because the court had failed “to advise [him] of potential adverse immigration consequences.” Citing this court’s decision in *State v. Poblete*, ___ Ariz. ___, 260 P.3d 1102 (App. 2011), the trial court summarily denied relief, concluding “*Padilla* does not apply retroactively.”

¶4 On review, Santa Maria asserts our decision in *Poblete* “was founded on a flawed analysis” and maintains the trial court erred in failing to address his separate argument that the court had not advised him pursuant to Rule 17.2(f), Ariz. R. Crim. P., when it accepted his guilty plea. First, we note that Santa Maria’s notice of post-conviction relief is untimely, and he therefore is entitled to relief only on certain grounds. Ariz. R. Crim. P. 32.4(a). In his notice/petition for post-conviction relief, Santa Maria

cited only Rule 32.1(a) and (f) as the grounds for relief. Because his notice was untimely, Santa Maria is not entitled to relief under Rule 32.1(a). Ariz. R. Crim. P. 32.4(a) (“Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).”). And as we explained in *Poblete*, relief under Rule 32.1(f) is appropriate “if the trial court failed to advise the defendant of his right to seek of-right post-conviction relief or if the defendant intended to seek post-conviction relief in an of-right proceeding and had believed mistakenly his counsel had filed a timely notice or request.” ___ Ariz. ___, ¶ 6, 260 P.3d at 1104, *citing* Ariz. R. Crim. P. 32.1(f) 2007 cmt. Like *Poblete*, Santa Maria makes no such claim here.

¶5 But even assuming Santa Maria had preserved a claim under Rule 32.1(g) that *Padilla* constituted a significant change in the law that entitled him to relief by arguing *Padilla* “applies entirely” to his case, we would agree with the trial court that he failed to state a colorable claim for relief. We have determined *Padilla* is not applicable retroactively, *Poblete*, ___ Ariz. ___, ¶ 16, 260 P.3d at 1107, and we decline Santa Maria’s invitation to reconsider that conclusion.¹

¶6 Santa Maria’s Rule 17.2(f) argument likewise lacks merit. That rule is “[a]pplicable to all criminal cases in which a[n] . . . admission of guilt . . . occurs on or after December 1, 2004.” Ariz. R. Crim. P. 17.2 cmt. Apart from his reliance on *Padilla*, which did not decide whether the trial court has a duty to advise a defendant of potential immigration consequences of a plea, Santa Maria has cited no authority to show that his

¹We note that our supreme court denied review of this court’s decision in *Poblete* on February 15, 2012.

claim based on Rule 17.2(f) falls under any of the exceptions to the rule of preclusion with respect to untimely post-conviction proceedings, nor has he established that Rule 17.2(f) applies retroactively. Therefore, although we grant the petition for review, we deny relief.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge